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In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,

PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

[Additional Captions Listed on Inside of Cover]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

QUESTION PRESENTED

How may the Court best protect religious liberty in ruling on the cases before it?

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INTERESTS OF THE *AMICI CURIAE*[1]

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents over 75,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. The Adventist Church operates the largest protestant educational system in the world. Within the United States, the Adventist Church operates 736 primary schools, 117 secondary schools, and 13 institutions of higher learning. The church operates 65 healthcare institutions in the United States. The Church also operates publishing houses, an international development NGO, and numerous community services centers. All of these organizations are equal expressions of the Church's mission. The Church has a strong interest in being able to continue all of its forms of ministry and still adhere to its understanding of scripture and God's commands.

Since its founding, the Seventh-day Adventist Church has a long commitment to religious liberty. From its earliest days, the Adventist Church experienced conflicts between its values and the requirements of governments. Through its own programs and the work of the International Religious Liberty Association founded in 1893, the Adventist Church has

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Consent from all Petitioners is being submitted to the Clerk with this brief. All Respondents have filed blanket consents with the Clerk.

worked to guarantee religious liberty for all people in the United States and around the world.

The Adventists Church's stance on marriage and the appropriate expression of human sexuality is clear and long standing. The Church's Fundamental Belief on Marriage and the Family states: "Marriage was divinely established in Eden and affirmed by Jesus to be a lifelong union between a man and a woman in loving companionship." The Church also believes that "all people, regardless of their sexual orientation, are loved by God. We do not condone singling out any group for scorn and derision, let alone abuse."

The Adventist Church's biblically based stance has not changed and will not change regardless of this Court's ruling. That the Church has chosen to file the present brief in support of neither party should not be viewed in any way as compromising, weakening, or stepping away from its belief or a willingness to do so. Rather, this posture reflects that the Church's stance (which long predates any discussion of same sex marriage) is based upon its obligation to be obedient to the Bible and God's commands. The constitutional analysis this Court must undertake is entirely different than the lens through which the Church views marriage.

The Church recognizes, however, that the Court's ruling can have a significant impact on its ability to carry out its mission unless appropriate religious liberty protections are in place. The Church asks that, if a constitutional right to same-sex marriage is found to exist, this secular conclusion not be imposed upon the many manifestations of its sacred work.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting

the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views about same-sex marriage and homosexuality, including religious people and institutions on all sides of the same-sex marriage debate, and including both non-LGBT and LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on same-sex marriage as such, but focuses instead on same-sex marriage only as it relates to religious liberty.

The Becket Fund has long sought to facilitate scholarly discussion of the impact that legal recognition of same-sex marriage will have on religious liberty. Ten years ago, it hosted a conference of noted First Amendment scholars—representing the full spectrum of views on same-sex marriage—to assess the religious freedom implications of legally-recognized same-sex marriage. The conference resulted in the book *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) ("*Emerging Conflicts*"). *Emerging Conflicts* began the scholarly discourse about the intersection of same-sex marriage and religious liberty. Since then, the Becket Fund has filed *amicus* briefs urging courts across the country to create space for legislative compromises

with respect to the conflict between religious liberty and recognition of same-sex marriage.

Based on its expertise in the field of religious liberty generally, and the intersection of same-sex marriage and religious liberty specifically, the Becket Fund joins this brief to urge the Court to ensure that its ruling preserves space for legislative and regulatory accommodations for religious objectors both in the specific context of same-sex marriage and in the broader context of LGBT rights generally.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although religious liberty does not appear on the face of the questions presented, the Court's decision in these cases will nevertheless have unavoidable and wide-ranging implications for religious liberty. If the Court rules in favor of Petitioners, then the decision will result in the recognition of same-sex marriage by the states that have not done so already, and some incremental harm to religious liberty will necessarily follow. If the Court rules in favor of Respondents, then many states will still have same-sex marriage, and some will not. Either way, the tension between protecting religious liberty and laws enforcing same-sex marriage will continue and will result in future conflicts, some of which inevitably will reach this Court.

This brief does not address the question of marriage itself, but instead focuses on the question of religious liberty. For religious people, not just the result, but the manner in which the Court reaches its decision in these appeals is of great importance. Will the Court's ruling preserve space for religious beliefs, or will the Court's reasoning render accommodations for sincere religious objections constitutionally suspect?

The question is not an idle one. As we explain in detail in our brief, hundreds of laws nationwide provide accommodations for religious conscientious objectors in the context of same-sex marriage, sexual orientation anti-discrimination, gender identity anti-discrimination, and the like. And if same-sex marriage is adopted nationwide, it is reasonable to expect that many more accommodations for religious organizations and individuals will be proposed and debated.

The Court's ruling in these appeals cannot lay to rest the continuing conflicts between religious liberty and a legally mandated right of same-sex couples to marry. It is for precisely that reason that the Court must appreciate the impact that both its holding—and its reasoning—will have on the ability to protect religious liberty.

Amici have compiled a non-exhaustive catalog of the existing state laws prohibiting gender, marital status, and sexual orientation discrimination and identifying the religious exemptions (if any) for each such law. See Appendix 2a-39a. This listing is but a sample of the kinds and number of laws that could be affected by recognition of same-sex marriage. See Appendix 2a-39a.

In particular, if the Court were to utilize an analysis that the laws before the Court are rooted in "animus" or "invidious" discrimination and thus fail to comply with the Equal Protection Clause, the numerous accommodations to the types of state laws reflected in the Appendix would be imperiled. It would be argued that these accommodations reflect a desire to harm same-sex couples, rather than an effort to protect conscientious objectors.

Because these cases will set the parameters of the debate over issues of religious liberty as they relate to same-sex marriage, the Court should not foreclose states' ability to moderate these potential conflicts by providing accommodations for conscientious objectors.

ARGUMENT

I. The Court's ruling on same-sex marriage must recognize the importance and vitality of religious liberty protections for conscientious objectors.

If this Court finds that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, then it also must acknowledge the religious liberty implications of such a ruling. These issues are far ranging and go well beyond the borders of the present appeals. As a result, the Court need not—and cannot—resolve these questions today. But at the same time, the Court should show its awareness both of the religious liberty repercussions of its holding and of the fact that those issues will need to be addressed in future cases.

Marriage has both legal and religious dimensions. As a legal relationship, the institution of marriage impacts everything from inheritance rights to evidentiary privileges; from insurance coverage to statutory wrongful death benefits. From the perspective of many religious groups, marriage is both a biblical commandment and a sacred union. In this case, the Court will set out the constitutional contours of civil marriage. But its holding cannot alter a religion's delineation of what constitutes a proper marriage, given that the government may not dictate "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 707 (2012). So long as religious organizations and religious authorities hold the theologically-based belief that same-sex marriage cannot be sanctioned, there will be a need to recognize their constitutionally guar-

anteed rights and preserve the ensuing issues of religious liberty that will follow when they seek to enforce those rights.

Religion is singled out in the Constitution for the special protections afforded by the Religion Clauses of the First Amendment. And as one noted scholar has observed, "religious liberty is the central value and animating purpose of the Religion Clauses." Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1. Indeed, "[t]he values underlying [the Religion Clauses] * * * have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972).

"One obvious and intuitive aspect of religious liberty is the right of conscientious objection to laws and regulations that conflict with conduct prescribed or proscribed by an adherent's faith." *Korte* v. *Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). For this very reason, "'[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices * * * .'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987)).

Any number of cases exemplify this doctrine. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (granting religious exemption to Seventh-day Adventist who was denied unemployment compensation benefits after she lost her job for refusing to work on her Sabbath day); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (allowing religious exemption to Amish families who challenged the application of a state compulsory-education law requiring their children to attend public school through age 16); *Thomas* v. *Review Bd.*, 450

U.S. 707 (1981) (creating religious exemption for a Jehovah's Witness denied unemployment compensation benefits after he was fired for declining a job transfer to a department that produced war materials); *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (requiring exception to Controlled Substances Act to allow use of otherwise-banned sacramental tea by members of a Brazilian church). Cf. *Holt* v. *Hobbs*, 135 S. Ct. 853, 860 (2015) (explaining that the Religious Land Use and Institutionalized Persons Act of 2000 provides "expansive protection for religious liberty.").

The protection given by this Court to religious objectors in a wide range of circumstances emphasizes the high value our nation places on religious freedom. As shown in the next section, see Section II(B), *infra*, this solicitude for religious liberty extends beyond these rulings, and is further shown by the significant number of states that have enacted some form of exemption from anti-discrimination laws for religious organizations and individuals of conscience.

Should the Court recognize same-sex civil marriage, religious organizations and conscientious objectors will rely on these exemptions as a protection against being compelled to condone or facilitate marriages which run counter to their fundamental beliefs. But these kinds of religious accommodations can serve an effective bulwark for religious liberty after the Court's ruling in the present appeals only if the Court makes clear that religious exemptions are not disfavored and represent a proper means of balancing societal interests. A ruling that is ambiguous or silent about religious liberty protections in this context would inevitably cast suspicion on religious objectors. Lower courts will likely split on whether longstanding religious

practices constitute *prima facie* evidence of anti-gay discrimination, instead of what they are: expressions of sincere religious belief.

The confines of these cases do not allow the Court to resolve all possible conflicts between religious liberty and legal recognition of same-sex marriage. These struggles will arise in any number of areas of life involving education, business, charitable activities, family law, and housing. Given the prospect of that long struggle, the Court should endeavor to shape its ruling in these appeals to ensure civility and mutual respect within that wider area of litigation. And the Court can go a long way towards making the debate civil by acknowledging the religious aspect of its ruling, expressly preserving existing statutory and regulatory religious accommodations, and making future religious accommodations possible. These steps will ensure that these issues can be debated and resolved appropriately in future cases.

II. According legal recognition to same-sex marriage without preserving space for robust religious liberty protections will result in wide-ranging church-state conflict.

Recognizing a constitutional right to same-sex marriage without simultaneously protecting conscience rights will trigger threats to the religious liberty of people and organizations who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage. Several factors indicate that, without such protections, widespread and intractable church-state conflicts will result.

First, the relatively short history of same-sex marriage thus far indicates that there will be a great deal of litigation in the future. The first state to give civil

recognition to same-sex marriage was Massachusetts, in 2003, and every other state to recognize same-sex marriage has done so within the last six years.[2] Even so, litigation over this issue is continuing. And because litigation under anti-discrimination laws tends to increase exponentially over time, the presence of these lawsuits is a strong indicator of many more lawsuits to come.[3] Even after this Court rules in the cases before it, the scope of potential conflict between religious liberty and same-sex marriage—absent robust religious accommodations—will continue to be widespread.

Second, a ruling from this Court that objecting to same-sex marriage is always irrational, is based on "animus" or "invidious discrimination," or that making distinctions regarding same-sex marriage constitutes gender or sexual-orientation discrimination, will have two major negative effects on religious objectors. One is that they will be vulnerable to lawsuits under

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[2] *Goodridge* v. *Dep't of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); Washington, D.C. (2010); New York (2011); Washington (2012); Maine (2013); Maryland (2013); California (2013); New Mexico (2013); Hawaii (2013); Minnesota (2013); Delaware (2013); New Jersey (2013); Rhode Island (2013); Illinois (2014); Utah (2014); Oklahoma (2014); Virginia (2014); Wisconsin (2014); Indiana (2014); Nevada (2014); Idaho (2014); Oregon (2014); Pennsylvania (2014); Arizona (2014); Wyoming (2014); Kansas (2014).

[3] See, *e.g.*, Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Lab. & Emp. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% * * * .").

anti-discrimination laws never designed for that purpose. In the Appendix, we have set forth a non-exhaustive list of the many state laws prohibiting gender, marital status, and sexual orientation discrimination and identifying the religious exemptions, if any for each such law. These laws could be triggered by recognition of same-sex marriage. See Appendix 2a-39a.

The other negative effect is that this Court's disapprobation would cast suspicion on religious objectors. Should this Court conclude that there can be no legal distinction between opposite- and same-sex marriages, these longstanding practices will suddenly become *prima facie* evidence of anti-gay discrimination, instead of expressions of longstanding moral worldviews that put opposite-sex marriage at the center of human sexuality. As this Court noted less than two years ago in *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013), "marriage between a man and a woman * * * had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."

Given these factors, it is not surprising that a scholarly consensus has emerged that giving legal recognition to same-sex marriage may result in widespread and foreseeable church-state conflict. The Court can expect that legislative exemptions will not resolve all of these conflicts, and that conscientious objectors will raise constitutional claims—involving free exercise, free speech, and equal protection issues—that the Court may need to address in the future.

Some scholars argue that the rights of religious believers should nearly always give way to the right of

gays and lesbians to be free from discrimination.[4] Others support strong exemptions for objecting religious believers.[5] But there is widespread scholarly agreement that the conflict is coming. And given the certainty of those conflicts, it would be prudent for this Court to stay its hand and allow the political process an opportunity to mitigate those conflicts.

A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative accommodations.

In the *Emerging Conflicts* book, seven prominent scholars of First Amendment law agreed that legal recognition of same-sex marriage, without more, would create widespread conflicts with religious liberty. See, *e.g.*, Marc D. Stern, *Same-Sex Marriage and the Churches*, *in Emerging Conflicts* 1, 1 (describing scope of anticipated conflicts). Leading LGBT rights advocate Chai Feldblum argued that conscientious objections to same-sex marriage are legitimate:

> I believe those who advocate for LGBT equality have downplayed the impact of such [anti-discrimination] laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

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[4] Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Emerging Conflicts* 123, 154.

[5] Douglas Laycock, *Afterword*, *in Emerging Conflicts* 189, 197-201.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Emerging Conflicts* 123, 125. Feldblum treated religious liberty concerns as well-founded, although she ultimately concluded that religious claims should fail. See *id.* at 155-56.

Others, such as leading religious liberty scholar Douglas Laycock—who likewise supports giving legal recognition to same-sex marriage—argue that some conflicts between same-sex marriage and religious liberty are unavoidable, but some could be mitigated by providing conscience protections. See, *e.g.*, Douglas Laycock, *Afterword*, *in Emerging Conflicts* 189, 197-201.

In addition to the scholarly consensus that serious conflicts between same-sex marriage and religious liberty exist, there also is a scholarly consensus that the conflict should be addressed by legally recognized exemptions for conscientious objectors. The focus of the scholarly debate, therefore, is not over whether there should be exemptions, but rather, concerns what the form and scope of those exemptions should be.

For example, legal scholars who support (or who are neutral towards) the adoption of same-sex marriage have written a series of detailed open letters to legislators in states considering same-sex marriage legislation, arguing that threats to religious liberty should be legislatively addressed. See, *e.g.*, Letter from Prof. Edward McGaffney, Jr. and others to Hawaii legislators (Oct. 17, 2013), http://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13.pdf (describing proposed religious protections); Letter from Prof. Douglas Laycock and others to Hawaii legislators (Oct. 23, 2013), http://mirrorofjus-

tice.blogs.com/files/hawaii-2013-fall-based.docx (supporting both same-sex marriage and strong religious exemptions). These scholars have also presented testimony to state legislative bodies considering religious liberty protections. See also Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, Mirror of Justice (Aug. 2, 2009), http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html ("Archive") (complete collection of scholarly letters and legislative testimony). Other scholars have acknowledged the need for exemptions, although they disagree about the scope of the religious liberty protections that should be enacted.[6] This disagreement has resulted in an ongoing and vigorous debate about the proper scope of exemptions.[7]

Leading scholars within the LGBT rights movement also advocate legislative protections for religious objectors. Professor William Eskridge of Yale has written that "Gay rights advocates put [the religious exemption] provision in ENDA, and it should be retained."[8] Professor Andrew Koppelman of Northwestern and Jonathan Rauch of the Brookings Institution

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[6] See Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274 (2010).

[7] See, *e.g.*, Thomas Berg, *Response from Scholars Supporting "Marriage Conscience" Religious Liberty Protection*, Mirror of Justice (Nov. 7, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/11/response-on-same-sex-marriage-and-religious-liberty.html (describing scholarly debate over Illinois provisions).

[8] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in*

both have advocated legislative accommodations as a solution to the conflict between same-sex marriage and religious liberty.[9]

There is thus a scholarly consensus that the conflicts between same-sex marriage and religious liberty are real, deeply rooted, and far-reaching. And, although they disagree about the details, scholars have reached a separate consensus that these conflicts can be significantly mitigated by carefully-crafted exemptions.

These consensus positions reinforce the commonsense conclusion that state legislators act rationally when they choose to reject giving legal recognition to same-sex marriage without conscience protections. And they counsel judicial restraint in the cases before the Court.

B. Most laws proscribing sexual orientation and gender-identity discrimination include religious liberty protections for conscientious objectors.

The attached Appendix contains a catalog of state anti-discrimination laws. All 50 states legislatively have enacted some form of anti-discrimination protection for their citizens. These statutes protect individuals in a wide number of contexts: employment, edu-

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American Law, 106 Yale L.J. 2411, 2456 (1997) (referring to proposed Employment Non-Discrimination Act).

[9] See, e.g., Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brook. L. Rev. 125 (2006); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. Times, Feb. 21, 2009, at WK11.

cation, housing, receipt of social services and government contracts, access to public accommodations, and extension of credit are among the most common. See Appendix 2a-37a. These laws reflect the nearly-universal recognition that individuals are entitled to be treated fairly and without regard to individual characteristics— such as race or gender— that have no meaningful relation to their exercise of fundamental rights.

That the states have legislated protection from discrimination is not surprising. What is more notable is that over two-thirds of the states also have enacted some form of exemption from these laws for religious organizations and individuals of conscience. See Appendix 1a.

These exemptions govern antidiscrimination laws based on sexual orientation, gender or gender identity, and marital status.[10] These exemptions also apply in a wide-ranging array of circumstances. Some are narrowly drafted to apply solely to religious educational institutions.[11] Others are more expansive and cover any religious or denominational institutions or organizations.[12] Some statutes permit religious groups to be exempt only from anti-discrimination

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[10] See Appendix.

[11] See, *e.g.*, Wash. Rev. Code Ann. § 49.60.215; Ky. Rev. Stat. Ann. § 344.555; La. Rev. Stat. Ann. § 49:146(A)(5).

[12] See, *e.g.*, Me. Rev. Stat. Ann. tit. V, § 4553(10)(G); N.H. Rev. Stat. Ann. § 354-A:18; 43 Pa. Const. Stat. § 954(b).

laws governing employment,[13] education,[14] housing,[15] insurance coverage,[16] or public accommodations.[17] Others give wide latitude to religious institutions to ensure that its employees conform to their religious tenets.[18]

In addition to these specifically enacted religious exemptions to state anti-discrimination laws, twenty states have chosen to provide additional protection for religious liberty through their state constitutions and state Religious Freedom Restoration Acts.[19] Other states have determined that their state constitutions protect the exercise of religion from neutral and generally applicable laws.[20]

The Court needs to be aware of the sheer number and variety of these state efforts to protect and secure religious liberty. And the Court needs to be sensitive to the impact that its ruling in the present appeals

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[13] See, *e.g.*, Colo. Rev. Stat. § 24-34-401; Idaho Code Ann. § 67-5910; Md. Code Ann. § 20-604.

[14] See, *e.g.*, Cal. Educ. Code § 221; Me. Rev. Stat. Ann. tit. V, § 4602(4); Minn. Stat. § 363A.26.

[15] See, *e.g.*, N.J. Rev. Stat. § 10:5-5(n); N.M. Stat. Ann. § 28-1-9; Or. Rev. Stat. § 659A.006(2).

[16] See Cal. Ins. Code § 10119.6.

[17] See, *e.g.*, Colo. Rev. Stat. § 24-34-601; Kan. Stat. Ann. § 44-1002; Iowa Code § 216.7(2)(a).

[18] See Me. Rev. Stat. Ann. tit. V, § 4573-A(2).

[19] See states designated with * in Appendix.

[20] Douglas Laycock, *The Religious Exceptions Debate*, 11 Rutgers J.L. & Religion 139, 142-43 n.17 (2009) (listing states and citations).

could have on the continuing vitality and effectiveness of these state laws. As Justice Brennan noted, "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities."[21] At the very least, the Court needs to ensure that further creation of religious exemptions, and application of existing religious exemptions in future circumstances, will not be foreclosed when states choose to recognize the need for them in their jurisdictions.

C. Most states that have adopted same-sex marriage legislatively have included religious liberty protections for conscientious objectors.

Twelve states—Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington—and the District of Columbia have adopted same-sex marriage by legislative action. Although their laws vary, and no state has provided complete protection to conscientious objectors, each jurisdiction has attempted to address the conflicts between same-sex marriage and religious liberty by providing accommodations for conscientious objectors.[22] For example, all

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[21] *Walz* v. *Tax Commission*, 397 U.S. 664, 692 (1970) (Brennan, J. concurring).

[22] Conn. Gen. Stat. § 46b-22b (2009); Del. Code Ann. tit. 13, § 106(e) (2013); Haw. Rev. Stat. § 572-12.1-12.2 (2013); 750 Ill. Comp. Stat. Ann. 5/209 (2014); Me. Rev. Stat. Ann. tit. 19-A, § 655 (2012); Md. Code Ann., Fam. Law §§ 2-201, 2-406 (2013); Minn. Stat. Ann. § 517.09, Subd. 2, 3 (2013); N.H. Rev. Stat. § 457:37 (2010); N.Y. Dom. Rel. Law § 11(1) (2014); R.I. Gen. Laws Ann. § 15-3-6.1 (2013); Vt. Stat. Ann. 9 § 4502(l) (2009);

of these jurisdictions exempt clergy and religious organizations from being required to officiate or solemnize a same-sex wedding if that would be inconsistent with their religious beliefs.[23] Although such exemptions may provide the constitutional minimum, they are not the only form of permissible protection for religious liberty.[24]

This experience—that every state legislature to adopt same-sex marriage has paired same-sex marriage legislation with religious liberty protections—is strong evidence counseling in favor of federal judicial restraint. Moreover, the fact that every state legislature to address same-sex marriage has recognized the conflict with religious liberty is also strong evidence that this concern is rational. Put another way, if protecting religious liberty is irrational, then all of these legislatures were acting irrationally at the time they passed legislation adopting same-sex marriage.

The truth, of course, is that the state legislatures and voters who adopted these laws have attempted to balance competing legitimate societal interests. And that is something that state political actors—legislatures and electorates—can do far more easily than the

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Wash. Rev. Code § 26.04.010 (2012); D.C. Code § 46-406(e) (2013).

[23] Sarah Eekhoff Zylstra, *Evangelicals' Favorite Same-Sex Marriage Law?*, Christianity Today, Jan. 17, 2014, available at http://www.christianitytoday.com/ct/2014/january-web-only/evangelicals-favorite-same-sex-marriage-law-oklahoma-utah.html.

[24] See Archive, *supra* (model legislation developed by leading church-state scholars that both adopts same-sex marriage and provides adequate protection for religious liberty concerns).

federal judiciary. See generally Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case W. Res. L. Rev. 1161 (2014) (describing political and legal landscape surrounding legislative religious accommodations).

D. Without religious liberty protections, broad-based church-state conflict will result.

If same-sex marriage is given legal recognition without concurrent protections for individuals and institutions with conscientious objections, then religious institutions face the risk of significant new sources of civil liability.

What follows is a non-exhaustive description of the kinds of conflicts that will be triggered if any protection afforded to same-sex marriage is not paired with religious liberty protections.

1. State and local government penalties

Adopting same-sex marriage exposes religious organizations to the denial of generally available government benefits. Where same-sex marriage is adopted without religious protections, those who conscientiously object to such marriages can be labeled unlawful "discriminators" and thus denied access to otherwise generally available state and local government benefits.

For example, religious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This is borne out in the reaction to the Boy Scouts' membership standards regarding homosexual

conduct.[25] The Boy Scouts have had to fight to gain equal access to public after-school facilities[26], they have lost leases to city campgrounds and parks,[27] and have also lost a lease to a government building that served as their headquarters for 79 years.[28] And the California Supreme Court recently adopted a rule that prohibits California state judges from participating in the Boy Scouts, for example, as Scoutmasters. See Cal. Code Jud. Ethics, Canon 2C and Advisory Committee Commentary (amended Jan. 21, 2015). If same-sex marriage is adopted without robust protections for conscientious objectors, then religious organizations that object to same-sex marriage could expect to face similar penalties under these more-restrictive laws.

A related concern exists with respect to licensing and accreditation decisions. In Massachusetts, for example, the state threatened to revoke the adoption license of Boston Catholic Charities because it refused on religious grounds to place foster children with

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[25] The Boy Scouts announced that, effective January 1, 2014, they would no longer "deny[ ] membership to youth on the basis of sexual orientation alone," *Boy Scouts of America Statement*, Boy Scouts of America (May 23, 2013), http://www.scouting.org/MembershipStandards/Resolution/results.aspx. However, the Scouts did not change their adult membership or youth conduct standards. *Id.*

[26] *Boy Scouts of Am.* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

[27] *Evans* v. *City of Berkeley*, 129 P.3d 394 (Cal. 2006)

[28] *Cradle of Liberty Council, Inc.* v. *City of Philadelphia*, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).

same-sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services.[29]

Similarly, religious colleges and universities have been threatened with the loss of accreditation because they object to sexual conduct outside of opposite-sex marriage. For example, the American Psychological Association, the government-designated accrediting body for professional psychology education programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about "codes of conduct that prohibit sex outside of marriage and homosexual behavior."[30] Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage likely will face similar threats.

In a similar vein, religious universities, charities, hospitals, and social service organizations often serve secular government purposes through contracts and grants. For instance, religious colleges participate in

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[29] Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006 (Catholic Charities had to choose between following Church beliefs and continuing to offer social services); cf. 102 Mass. Code Regs. §§ 1.03(1), 5.04(1)(c); 110 Mass. Code Regs. § 1.09(2) (regulations requiring non-discrimination based upon marital status and sexual orientation).

[30] D. Smith, *Accreditation committee decides to keep religious exemption*, 33 Monitor on Psychology 16 (Jan. 2002) (describing why APA ultimately abandoned proposal).

state funded financial aid programs, religious counseling services provide marital counseling and substance abuse treatment, and religious homeless shelters care for those in need. Although many of those organizations do not discriminate with regard to the beneficiaries of the services they provide, they may have internal personnel policies that require the employees who provide those services to comply with the organizations' religious beliefs.

Many contracts and grants require recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex marriage is recognized without specific accommodations for religious organizations, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants. In the marriage context, religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable antidiscrimination standards.

Religious organizations opposed to same-sex marriage also face debarment from government social service contracts. Catholic Charities in the District of Columbia was forced to stop providing foster care services due to its religious beliefs regarding the recognition of same-sex marriages.[31] If same-sex marriage is

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[31]Michelle Boorstein, *Citing same-sex marriage bill, Washington Archdiocese ends foster-care program*, Wash. Post, Feb. 17, 2010.

given legal recognition without accommodation for religious objectors, then many religious organizations will be forced either to extend benefits to same-sex spouses against their religious beliefs or be debarred from government social services contracts.[32]

Without adequate conscience protections, the charitable tax exempt status of many religious institutions could be stripped by local governments based solely on that religious institution's conscientious objection to same-sex marriage. See, *e.g.*, *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (rejecting Free Exercise Clause defense to IRS withdrawal of 501(c)(3) status based on religious belief against interracial dating and marriage as being contrary to a compelling government public policy).

The conflict between same-sex marriage and religious liberty affects individual religious believers as well. As we noted above, the California Supreme Court voted that, as of January 2016, California state judges are barred from belonging to youth organizations that "invidiously discriminate," apparently with the Boy Scouts of America in mind.[33] The situation is similarly acute for state-employed professionals like social workers who face a difficult choice between

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[32] See, *e.g.*, *Catholic Charities of Maine, Inc.* v. *City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend employee spousal benefit programs to registered same sex couples, or lose access to all city housing and community development funds).

[33] See Thomas Curwen, *State high court's vote affecting Scout affiliation stirs debate anew*, L.A. Times, Jan. 24, 2015; Cal. Code Jud. Ethics, Canon 2C, Advisory Committee Commentary.

their conscience and their livelihood.[34] Unless adequate protections for conscientious objectors are allowed to remain, conflicts like these will be even more widespread as religious believers' long-held views on marriage suddenly become *prima facie* evidence of discriminatory animus under anti-discrimination laws.

2. Private plaintiff lawsuits targeting religious defendants

If this Court holds that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, then the distinction between opposite-sex marriage and other legal relationships would constitute unlawful discrimination. In that situation, a proliferation of potential private discrimination actions could arise if the Court does not equally recognize the need for accommodations for conscientious objectors.

Religious institutions often provide a broad array of programs and facilities to their members and to the general public, such as hospitals, schools, adoption services, and marital counseling. Religious institutions typically enjoy some latitude in choosing what religiously-motivated services and facilities they will offer. But according legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in at least two ways.

First, as shown in the Appendix, many states have public accommodations laws that ban discrimination

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[34] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. Pub. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).

on the basis of gender, marital status, or sexual orientation. See Appendix 2a-39a. Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. See, *e.g.*, Hutchinson, Kan. Human Relations Commission, *Definitions and FAQs under Proposed Sexual Orientation and Gender Identity Protections* 4 (2012).[35] When coupled with legally-recognized same-sex marriage, these two facts create significant liability risk for religious objectors.

Some of the many religiously-motivated services that could be "public accommodations" are: marriage counseling, family counseling, job training programs, child care, gyms and day camps,[36] life coaching, schooling,[37] adoption services,[38] and the use of wedding ceremony facilities.[39]

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[35] http://www.hutchgov.com/egov/docs/1332537777_170654.pdf.

[36] See Melissa Walker, *YMCA rewrites rules for lesbian couples*, Des Moines Register, Aug. 6, 2007 (city forced YMCA to change its definition of "family" or lose grant).

[37] See *Gay Rights Coal. of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc) (public accommodations statute required equivalent access to all university facilities.).

[38] See *Butler* v. *Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (Arizona adoption facilitation website was public accommodation under California law).

[39] See *Bernstein* v. *Ocean Grove Camp Meeting Ass'n*, No. DCR PN34XB-03008 (N.J. Off. of Att'y Gen., Div. on Civil Rts., Oct. 23, 2012) (Methodist organization violated public accommodations law by denying same-sex couples use of wedding pavilion because it opened pavilion for other weddings).

In a different context, religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing support for same sex unions. Housing discrimination lawsuits would result. See *Levin* v. *Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (lesbian couple stated valid disparate impact sexual orientation discrimination claim).

Finally, religious organizations that object to same-sex marriage may also face private lawsuits when one of their employees enters into a civilly-recognized same-sex marriage. For many religious institutions, an employee's entering a same-sex marriage would constitute a public repudiation of the institution's core religious beliefs in a way that less public relationships do not. Some employers will respond by changing the terms of employment for those employees. These employees may then sue under laws prohibiting gender, sexual orientation, or marital status discrimination in employment.[40] If the employee is a "minister," or the relevant statute includes an exemption, then the defendant religious employer could raise an affirmative defense.[41] But where the employee does not qualify as a minister and no legislative

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[40] See Tenn. Code Ann. § 4-21-401 (gender); Mich. Comp. Laws Ann. 37.2202 (gender and marital status); Ky. Rev. Stat. Ann. § 344.040 (gender); Ohio Rev. Code Ann. §§ 4112.02(A), 3301.53(A)(3) (gender); see also Appendix.

[41] See, *e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 707; *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 96 (2011) (applying Title VII's religious exemption).

exemption is in place, the employer will be exposed to liability for any alleged adverse employment action.

3. The need for accommodation

The foregoing examples are by no means exhaustive. They suffice to make clear, however, that these religious liberty disputes arise across a wide range of factual circumstances. They also demonstrate that according legal recognition to same-sex marriage without providing robust religious liberty protections will create conflicts that would work a "sea change in American law" and "reverberate across the legal and religious landscape."[42]

As discussed above, the states that have adopted same-sex marriage by legislative action all have sought to moderate these potential conflicts between allowing same-sex marriage and religious liberty by providing accommodations for conscientious objectors. This form of rational balancing should be encouraged, not obliterated, by a ruling that characterizes them as based on "animus" or "invidious discrimination." As noted by Professor Laycock:

> [U]navoidable conflict [between the interests of same-sex couples and the interests of conscientious objectors] does not necessarily mean unmanageable conflict. For the most part, these conflicts are not zero-sum games, in which every gain for one side produces an equal and opposite loss for the other side. If legislators and judges will treat both sides with respect, harm to each side can be minimized. Of course,

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[42] Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Emerging Conflicts* 1, 1.

that is a huge "if."

Douglas Laycock, *Afterword, in Emerging Conflicts* 189, 196.

In addressing whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, the Court should allow room for the religious liberty implications of its ruling to be addressed both by the states (in crafting future legislation) and by the courts in future cases.

III. Treating conscientious objection to same-sex marriage as "animus" or "invidious discrimination" would place in serious jeopardy hundreds of existing laws designed to protect religious liberty.

In these appeals, the Court will resolve whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. On that narrow legal question neither *amicus* takes a position.

But given the number and scope of state laws that seek to prohibit discrimination and protect religious liberty, the weightier issue for advocates of religious liberty focuses on the manner in which the Court will arrive at its conclusion in these cases. Should the Court decide that Respondents' marriage laws are necessarily based on "animus" or "invidious discrimination," then many— if not all— of the existing laws designed to accommodate religious conscientious objections would be placed in serious jeopardy. Such a ruling also would place at risk future accommodations for religious liberty.

Yet religious liberty protections for people in this category are not a manifestation of animus, but simply a recognition that beliefs about these matters

are important, often "define the attributes of personhood," and should be formed without "compulsion of the State." *Lawrence* v. *Texas*, 539 U.S. 558, 574 (2003). Religious people should be given room to define their own concepts of "meaning" just as other citizens do. *Ibid.* The Court should therefore carefully consider the inevitable impact its holding will have on laws designed to protect the rights of religious conscientious objectors.

A. The Court's equal protection jurisprudence does not provide a clear method of analysis to resolve these appeals.

The hallmark of this Court's equal protection analysis is the use of a multi-tiered analytical framework. Although well-established, this methodology does not predetermine the manner in which the Court will decide the question before it.

Under the tiered equal protection inquiry, most legislative classifications receive "rational basis review" and will be upheld if the courts discern that the classification is "rationally related to a legitimate state interest." *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citing cases). Classifications that involve a suspect class or burden a fundamental right are subject to "strict scrutiny" and will be upheld only if they are "narrowly tailored" to achieve a "compelling" government interest. *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). Finally, classifications burdening a few "semi-suspect classes" will be subject to "intermediate scrutiny" and will be upheld when they are found to be "substantially related" to the achievement of "important governmental objective[s]," *United States* v. *Virginia*, 518 U.S. 515, 524 (1996) (gender discrimination).

Although widely used, these three tiers are by no means the only lenses by which courts have viewed a challenged legislative classification. Some cases have articulated other standards that do not fit comfortably into the three-tier structure. For example, Gerald Gunther famously referred to a different standard known as rational basis with "bite."[43] Similarly, some courts have applied "heightened scrutiny."[44] This level of scrutiny appears to lie somewhere in between rational basis review and intermediate scrutiny, and has been applied by the lower courts in cases involving

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[43] Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-22 (1972) (describing the difference between traditional rational basis review and a strengthened rationality scrutiny); see also Kenji Yoshino, *Why the Court can strike down marriage restrictions under rational-basis review*, SCOTUSblog (Aug. 23, 2011), http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/ (describing application of rational basis with "bite" to marriage challenges).

[44] See *SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (classifications based on sexual orientation are subject to heightened scrutiny); *Baskin* v. *Bogan*, 766 F.3d 648, 656 (7th Cir.), cert. denied, 135 S. Ct. 316, and cert. denied sub nom. *Walker* v. *Wolf*, 135 S. Ct. 316 (2014) (outlining but not ultimately relying on heightened scrutiny standard); *Massachusetts* v. *U.S. Dept. of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications."), cert denied sub nom. *Dept. of Health & Human Servs.* v. *Massachusetts*, 133 S. Ct. 2887 (2013).

sexual orientation and gender identity Equal Protection claims.[45] In the Ninth Circuit's formulation, "when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline*, 740 F.3d at 483 (quoting *Witt* v. *Dept. of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008)).

Relying on yet another proposed standard based on the concept of "animus" and this Court's holding in *Romer* v. *Evans*, 517 U.S. 620 (1996), some *amici* urge this Court to hold that statutes that do not allow for same-sex-marriage be struck down as motivated by "animus." Under this approach, a court would look to multiple factors to determine whether "animus" was present at the time a challenged provision had been enacted, including but not limited to: "(1) the law's text; (2) the political and legal context of its passage, including the legislative proceedings and history and evidence that can be gleaned from the sequence of events that led to passage; (3) the law's real-world impact or effects; and (4) the government's failure to offer legitimate objectives for the law along with means that truly advance those objectives."[46] If these factors, collectively, allow a court to conclude that the law was enacted "not to further a proper legislative end but to make [gay people] unequal to everyone else," then the

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[45] See *supra* note 44.

[46] Brief of Human Rights Campaign *et al.*, at 8 http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/thepeoplesbrief.pdf ("HRC Brief") (draft brief posted online to solicit signatures).

law must be struck down. HRC Br. 9 (quoting *Romer*, 517 U.S. at 635) (alteration in brief).

This proposed standard fails both as an interpretation of *Romer* and because if adopted it would endanger many existing and future religious accommodation statutes.

In *Romer*, the Court applied rational basis review in an equal protection challenge to a sexual orientation classification. The Colorado Supreme Court had applied strict scrutiny to strike down a voter-approved referendum known as Amendment 2 that "prohibit[ed] all legislative, executive, or judicial action at any level of state or local government designed to protect the named class" of "homosexual persons or gays and lesbians." *Id.* at 624-625. But the Supreme Court declined to apply either strict or intermediate scrutiny and instead held that the referendum "fails, indeed defies, even this conventional inquiry" of whether a law bears a rational relation to some legitimate end. *Id.* at 632; see *id.* at 635 ("a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not"). The Court further found that "a bare * * * desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.*at 634-635 (quoting *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973)). Because that bare desire to harm was present in Colorado's adoption of Amendment 2, the law lacked even a rational basis.

Thus on its own terms, *Romer* does not prove as much as the proponents of the "animus" standard would have it do: it is quite a stretch to turn "a bare desire to harm" into a mere "want of careful reflection." Indeed, if mere "want of careful reflection" is

enough to strike down voter propositions or legislatively-enacted statutes, then many more laws are at risk than those currently before the Court.

And *Romer* is more nuanced about government accommodations of religious conscientious objectors than the proponents of the animus argument make it out to be. Indeed, *Romer* expressly distinguishes laws like Amendment 2 from narrower religious accommodations, referring to protections for "the liberties of landlords or employers who have personal or religious objections to homosexuality" as potentially having "identifiable legitimate purpose[s] or discrete objective[s]." *Romer*, 517 U.S. at 635. On this reading, *Romer* would have been decided the other way had Amendment 2 merely required accommodations for religious objectors as opposed to banning state and municipal sexual orientation anti-discrimination laws across the board.

But the *Romer* animus proposal is not just a poor interpretation of *Romer*. As set out below, the proposed *Romer* animus standard would also endanger hundreds of existing religious accommodations.

B. If the Court were to rely on "animus" or "invidious discrimination" as its form of analysis, existing state and local religious liberty protections would be threatened.

If the Court invalidates opposite-marriage laws based on a level of scrutiny that relies on "animus" or "invidious discrimination," then existing state and local religious liberty protections would be threatened. We have already noted that these existing religious liberty protections include exemptions in public accommodation laws, housing discrimination laws, and employment discrimination laws. See *supra* Section I

at nn. 12-19. Hundreds of religious liberty exemptions would thus be placed in jeopardy if the Court finds that all such classifications are based on "animus" or "invidious discrimination."

Applying this level of scrutiny, a court might simply dispense with the need to find any actual animosity towards gays or lesbians to strike down a state's religious exemption. Instead, a court might find only that there had been a "want of careful, rational reflection" HRC Br. at 6, or presume that any law accommodating conscientious objection to same-sex marriage automatically constitutes animus. Rather than merely endorse equality of marriage, such a holding would vilify religious organizations and authorities whose beliefs are inconsistent with same-sex marriage.

Finally, *amici* note that there is a strong argument that giving legal recognition to civil same-sex marriage *without* providing religious accommodations demonstrates animus towards religious people and institutions. Given the current state of the debate over same-sex marriage and religious liberty, no Member of Congress, legislator, or city councilperson can plausibly claim to be unaware that adopting same-sex marriage will have significant negative effects on the ability of religious conscientious objectors to participate fully in society. And just as employers ought not to be able to play dumb with respect to whether someone wearing a religious headscarf needs a religious accommodation, cf. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), cert. granted, 135 S. Ct. 44 (2014), legislators should not be allowed to pretend that they are surprised to discover that religious people and institutions are deeply and adversely affected when same-sex marriage laws are enforced without robust religious protections.

CONCLUSION

This Court should rule in a way that acknowledges the importance of statutory exemptions for religious organizations and conscientious objectors.

Respectfully submitted.

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APPENDIX

Summary of Relevant Religious Exceptions by State

Number of states with anti-discrimination statutes	50
Number of states protecting against sexual orientation discrimination	23
Number of states protecting against gender discrimination	50
Number of states protecting against marital status discrimination	36
Number of states with anti-discrimination statutes that contain religious exceptions	34
Number of states with Religious Freedom Restoration Acts	20

Selected Anti-Discrimination Statutory Provisions and Relevant Religious Exceptions by State[1]

Note: Bolded statutes contain exceptions.

Statute	Protected Categories	Religious Exception
ALABAMA*		
ALA. CODE §§ 24-8-4 *RELIGIOUS FREEDOM RESTORATION ACT LEGISLATION ("RFRA"): ALA. CONST. ART. I, § 3.01 (1999)	Sexual Orientation: Housing	
	Gender: Housing	
	Marital Status: Housing	

[1] See Key on pages 37a-39a for explanation of numbers in "Religious Exception" column.

ALASKA		
ALASKA STAT. §§ 18.80.220, 18.80.230, 18.80.240, 18.80.250	<u>Gender:</u> Employment Housing Public Accommodation Extension of Credit	
	<u>Marital Status:</u> Employment Housing Public Accommodation Extension of Credit	

ARIZONA*		
ARIZ. REV. STAT. ANN. §§ 20-632.01, 41-1421, 41-1442, 41-1462, 41-1463, 41-1464, 41-1491.14, 41-1491.15, 41-1491.20, 41-1491.21, 42-3751 *RFRA: ARIZ. REV. STAT. ANN. §§ 41-1493 TO 1439.02 (1999)	Sexual Orientation: Insurance Practices	
	Gender: Insurance Practices Voting Public Accommodation Employment Housing Government Contracts	11
	Marital Status: Insurance Practices Housing	
ARKANSAS		
ARK. CODE ANN. §§ 11-11-225, 16-123-204, 16-123-206, 16-123-310, 16-123-311, 16-123-315, 16-123-316, 20-47-220, 20-76-202, 21-12-103	Gender: Employment Housing Social Services	
	Marital Status: Housing	

CALIFORNIA		
CAL. BUS. & PROF. CODE § 16721 CAL. CIV. CODE §§ 51, 51.5, 53, 782.5 CAL. EDUC. CODE §§ 200, 220, **221**, 230, 51500, 66270, 66271 CAL. GOV'T CODE §§ 11135, 12920, 12921, **12922**, **12926**, **12926.2**, 12940, 12944, 12955, **12995**	<u>Sexual Orientation:</u> Education Social Services Employment Housing Insurance Practices Social Services Foster Care Government Contracts Public Accommodation Commerce Juvenile Detention	8, 12, 13

CAL HEALTH & SAFETY CODE §§ 1365.5, 1502.35, 1522.41, 1529.2 CAL. INS. CODE §§ 10119.6, 10140 CAL. PUB. CONT. CODE § 2500, 6108 CAL. WELF. & INST. CODE §§ 224.71, 16001.9, 16013	<u>Gender & Gender Identity:</u> Education Social Services Employment Housing Insurance Practices Social Services Foster Care Government Contracts Public Accommodation Commerce Juvenile Detention	8, 12, 13
	<u>Marital Status:</u> Education Employment Housing Insurance Practices Government Contracts Public Accommodation Commerce	8, 13

COLORADO		
COLO. REV. STAT. §§ 5-3-210, 12-54-104, 12-54-301, **24-34-401**, 24-34-402, 24-34-502, **24-34-601**	<u>Sexual Orientation:</u> Extension of Credit Provision of Funeral Services/Cremation Foster Care Employment Housing Public Accommodation Insurance Practices	8, 9
	<u>Gender:</u> Extension of Credit Provision of Funeral Services/Cremation Foster Care Employment Housing Public Accommodation Insurance Practices	8, 9
	<u>Marital Status:</u> Extension of Credit Provision of Funeral	9

	Services/Cremation Housing Public Accommodation Insurance Practices	

CONNECTICUT*		
CONN. GEN. STAT. §§ 4a-60, 4a-60a,10-15c, **45a-726a**, 46a-59, 46a-60, 46a-60a 46a-64, 46a-64c, 46a-66, 46a-71--46a-76, 46a-81c, 46a-81d, 46a-81e--46a-81n, **46a-81p**, **46a-81aa**, 81b *RFRA: CONN. GEN. STAT. ANN. § 52-571b	<u>Sexual Orientation</u>: Employment Public Accommodation Housing Government Contracts Professional Organizations Extension of Credit State Agency Services State Benefits	14, 15
	<u>Gender & Gender Identity:</u> Employment Housing Public Accommodation Government Contracts Professional Organizations State Agency Services State Benefits Extension of Credit	14, 15

	Marital Status: Employment Housing Extension of Credit State Agency Services State Benefits	3
DELAWARE		
DEL. CODE ANN. TIT. VI, §§ 4504, 4603, 4604, 4605, 4606, 4619 DEL. CODE ANN. TIT. XIX, § 711 DEL CODE ANN. TIT. XVII, §§ 2304, 4124 DEL. CODE ANN. TIT. XXIX, § 6519A DEL. CODE ANN. TIT. XXV, §5116	Sexual Orientation: Housing Public Accommodation Employment	
	Gender & Gender Identity: Housing Public Accommodation Employment	
	Marital Status: Housing Public Accommodation Employment	

FLORIDA*		
FLA. STAT. §§ 110.181, 287.134, 446.51, 542.34, 760.08, 760.10, 760.23, 760.24, 760.25, 760.26, 760.60, 1000.05 *RFRA: FLA. STAT. ANN. §§ 761.01 TO 761.05	Gender: Government Contracts Commerce Public Accommodation Employment Housing State Employees' Charitable Campaign Club Membership Education Social Services	
	Marital Status: Public Accommodation Employment Housing State Employees' Charitable Campaign Club Membership Education Social Services	

GEORGIA		
GA. CODE ANN. §§ 7-6-1, 8-3-202, 8-3-203, 8-3-204, 45-19-29, 45-19-30, 45-19-31, 43-39A-18	<u>Gender:</u> Employment Extension of Credit Housing Foster Parents	
	<u>Marital Status:</u> Extension of Credit Housing Foster Parents	

HAWAII		
HAW. REV. STAT. §§ 171-64, 246-12.2, 302A-1001, 378-2, 489-3, 515-3, 515-4, 515-5, 515-6, 515-7, 515-16, 516-62, 612-2	Sexual Orientation: Public Accommodation Housing Employment	3
	Gender & Gender Identity: Public Accommodation Housing Use of Public Lands Golf Course Education and Recreation Using State Facilities or Funds Employment Jury Service	3
	Marital Status: Housing Employment	3

IDAHO*		
IDAHO CODE ANN. §§ 16-2402, 18-7301, 18-7303, 67-5909, **67-5910** *RFRA: IDAHO CODE ANN. §§ 73-401 TO -404	<u>Gender:</u> Employment Public Accommodation Education Housing Employment and Health Services	4, 9

ILLINOIS*		
775 ILL. COMP. STAT. §§ **5/2-101**, 5/2-102, 5/2-105, 5/3-103, 5/3-105, 5/4-102, 5/4-103, **5/5-101**, 5/5-102, 10/1--10/7, 15/3, 15/5, 20/3 205 ILL. COMP. STAT. § 635/3-8 *RFRA: ILL. COMP. STAT. § 35/1-99	<u>Sexual Orientation:</u> Employment Public Accommodation Housing Government Contracts Extension of Credit	6
	<u>Gender:</u> Employment Public Accommodation Housing Government Contracts Commerce	6
	<u>Marital Status:</u> Employment Public Accommodation Housing Government Contracts	6

INDIANA		
IND. CODE §§ 22-9-1-2, 22-9-1-3, 22-9.5-5-1--4, 5-16-6-1,16-23-1-21, 24-9-3-9, 20-24-2-2, 20-25.5-4-1, 22-9-1-10, 35-46-2-2	Gender: Housing Education Employment Public Accommodation Government Contracts Hospitals Commerce Jury Selection	6
	Marital Status: Housing Commerce	

IOWA		
IOWA CODE §§ 216.6, 216.6A, 216.7, 216.8, 216.8A, 216.9, 216.10, 216.11, 216.11A, 216.12, 216.12A, 537.3311, 607A.2 729.4	Sexual Orientation: Employment Public Accommodation Housing Education	1, 2, 16
	Gender & Gender Identity: Employment Public Accommodation Housing Education Jury Service	1, 2, 16
	Marital Status: Employment Public Accommodation Housing Education	1, 2, 16

KANSAS*		
KAN. STAT. ANN. §§ 44-1001, **44-1002**, 44-1009, 44-1016, 44-1017 *RFRA: 2013 KAN. SESS. LAWS 155	Gender: Employment Housing Public Accommodation	8, 9
KENTUCKY*		
KY. REV. STAT. ANN. §§ 45.570, 344.040, 344.130, **344.555**, 344.360, 344.362 *RFRA: KY. REV. STAT. ANN. § 446.350	Gender: Employment Housing Education Government Contracts	6
	Marital Status: Housing	

LOUISIANA*		
LA. REV. STAT. ANN. §§ 23:302, 23:332, 49:146, 51:2247, 51:2606, 51:2607 *RFRA: LA. REV. STAT. ANN. §§ 13:5231 TO 13:5242	Gender: Employment Public Accommodation Housing	6

MAINE		
ME. REV. STAT. §§ 784, **4553,** 4571, 4572, **4573-A,** 4581, 4581-A, 4591, 4592, **4602**	<u>Sexual Orientation:</u> Employment Housing Public Accommodation Education	1, 2, 7, 10
	<u>Gender:</u> Employment Housing Public Accommodation Education Government Contracts	7
	<u>Marital Status:</u> Education	5

MARYLAND		
MD. CODE ANN. §§ 19-114, 19-311 20-302, 20-304, 20-402, 20-602, **20-604**, **20-605**, 20-606, 20-702, 20-703	<u>Sexual Orientation:</u> Employment Housing Public Accommodation Government Contracts	1
	<u>Gender & Gender Identity:</u> Employment Housing Public Accommodation Licensed Social Workers Government Contracts	
	<u>Marital Status:</u> Employment Housing Public Accommodation Government Contracts	1

MASSACHUSETTS		
MASS. ANN. LAWS CH. 272 §§ 92A, 98 MASS. ANN. LAWS CH. 151B §§ 1, 4	<u>Sexual Orientation:</u> Public Accommodation Employment Housing Extension of Credit	3, 4
	<u>Gender & Gender Identity:</u> Public Accommodation Employment Housing Extension of Credit	3, 4
	<u>Marital Status:</u> Housing Extension of credit	3, 4

MICHIGAN		
MICH. COMP. LAWS ANN. §§ 37.2202, 37.2209, 37.2402, 37.2502, 390.933	Gender: Employment Housing Education Government Contracts	
	Marital Status: Employment Housing Education Government Contracts	

MINNESOTA		
MINN. STAT. §§ 363A.02(1)(A), 363A.08, 363A.09, 363A.10, 363A.11, 363A.13, 363A.17, 363A.20(2), 363A.21, 363A.23, **363A.26**	Sexual Orientation: Employment Housing Public Accommodation Education Business Relations	1, 2, 9, 10
	Gender: Employment Housing Public Accommodation Education	
	Marital Status: Employment Housing Public Accommodation Education	

MISSISSIPPI*		
MISS. CODE ANN. §§ 57-10-519, 57-71-19, 57-77-27 *RFRA: MISS. CODE ANN. § 11-61-1	Gender: Business Loans	
MISSOURI*		
MO. REV. STAT. §§ 173.1102, **213.010(7)**, 213.040, 213.055, **213.065** *RFRA: MO. ANN. STAT. §§ 1.302 TO 1.307	Gender: Employment Housing Public Accommodation Education	8, 9

MONTANA		
MONT. CODE ANN. §§ 49-2-303, 49-1-102, 49-2-304, 49-1-102, 49-2-305, 49-2-307	<u>Gender:</u> Employment Housing Public Accommodation Education	
	<u>Marital Status:</u> Employment Housing Public Accommodation Education	
NEBRASKA		
NEB. REV ST. §§ 20-124, 20-132, 20-134, 20-318, 48-1104, 48-1122	<u>Gender:</u> Employment Housing Public Accommodation Government Contracts	
	<u>Marital Status:</u> Employment	

NEVADA		
NEV. REV. STAT. §§ 118.093, 118.100, **613.320**, 613.330, 613.350, 651.070	<u>Sexual Orientation:</u> Employment Public Accommodation Housing	1
	<u>Gender & Gender Identity:</u> Employment Public Accommodation Housing	1

NEW HAMPSHIRE		
N.H. REV. STAT. ANN. §§ **354-A:2(VII) & (XIV-C)**, 354-A:6, 354-A:7, 354-A:8, 354-A:9, 354-A:10, 354-A:16, 354-A:17, **354-A:18**	<u>Sexual Orientation:</u> Employment Housing Public Accommodation	1, 2, 3, 4, 8, 9
	<u>Gender:</u> Employment Housing Public Accommodation	3, 4, 8, 9
	<u>Marital Status:</u> Employment Housing Public Accommodation	3, 4, 8, 9

NEW JERSEY		
N.J. REV. STAT. §§ 10:1-2, 10:1-3, 10:2-1, 10:5-5(l) & (n), 10:5-12	<u>Sexual Orientation:</u> Employment Housing Public Accommodation Government Contracts	3, 7, 9
	<u>Gender:</u> Employment Housing Public Accommodation Government Contracts	3, 7, 9
	<u>Marital Status:</u> Employment Public Accommodation Housing Government Contracts	3, 7, 9

NEW MEXICO*		
N.M. STAT. ANN. §§ 28-1-7, 28-1-9 *RFRA: N.M. STAT. ANN. §§ 28-22-1 TO -5	Sexual Orientation: Employment Housing Public Accommodation	1, 2, 3
	Gender & Gender Identity: Employment Housing Public Accommodation	1, 2, 3
	Marital Status: Employment Housing Public Accommodation	3

NEW YORK		
NY EXEC. LAW §§ 296, 312 NY EDUC. LAW § 313	Sexual Orientation: Education Employment Housing Public Accommodation	4, 5
	Gender: Education Employment Government Contracts Housing Public Accommodation	4, 5
	Marital Status: Education Employment Government Contracts Housing Public Accommodation	4, 5

NORTH CAROLINA		
N.C. GEN. STAT. ANN. §§ 41A-4, 143-135.3	<u>Gender:</u> Housing Government Contracts	
NORTH DAKOTA		
N.D. CENT. CODE §§ 14-02.4–16, 14-02.4-14–16, 14-02.5-02–08, 23-17.3-05	<u>Gender</u>: Employment Housing Licensing Public Accommodation	
	<u>Marital Status</u>: Employment Housing Public Accommodation	

OHIO		
OHIO REV. CODE ANN. §§ 4112.02, 3301.53, 340.12, 1751.18, 3701.46	<u>Gender:</u> Housing Employment Public Accommodation Social Services/ Government Contracts	
	<u>Marital Status:</u> Social Services Government Contracts	

OKLAHOMA*		
OKLA. STAT. TIT. XXV, §§ 1302–1306, 1452, 1506.9 OKLA. STAT. TIT. IIIA, § 301 OKLA. STAT. ANN. TIT. XXV, § 1402, OKLA. STAT. ANN. TIT. XLVII, § 1104.6 *RFRA: OKLA. STAT. ANN. TIT. 51, §§ 251 TO 258	Gender: Employment Housing Social Services Public Accommodation	
	Marital Status: Social Services	

OREGON		
OR. REV. STAT. §§ 418.648, 443.739, 458.505, 659.850, **659A.006**, 659A.403, 659A.421, 659A.030	Sexual Orientation: Education Public Accommodation Employment Housing Social Services	1, 2, 3, 4
	Gender: Education Public Accommodation Employment Housing Extension of Credit	1, 2, 3, 4
	Marital Status: Education Housing Social Services	1, 2, 3, 4

PENNSYLVANIA*		
43 PA. CONST. STAT. §§ 954, 955 24 PA. CONST. STAT. §§ 5002, 5004	Gender: Employment Housing Public Accommodation Education Insurance Practices	3, 4, 8
35 PA. CONST. STAT. § 448.804, 40 PA. CONST. STAT. § 1171.5 *RFRA: 71 PA. CONST. STAT. §§ 2401 TO 2407	Marital Status: Insurance Practices	

RHODE ISLAND*		
R.I. GEN. LAWS §§ 11-24-2, 28-5-7, 28-5.1-14, 34-37-1–4, 28-5-6 *RFRA: R.I. GEN. LAWS §§ 42-80.1-1 TO -4	<u>Sexual Orientation:</u> Employment Public Accommodation Education Commerce	4
	<u>Gender & Gender Identity:</u> Employment Housing Public Accommodation Education	4
	<u>Marital Status:</u> Commerce Housing	
SOUTH CAROLINA*		
S.C. CODE ANN. §§ 1-13-80, 31-21-40 *RFRA: S.C. CODE ANN. §§ 1-32-10 TO -60	<u>Gender:</u> Employment Housing	4

SOUTH DAKOTA		
S.D. CODIFIED LAWS §§ 20-13-10, **20-13-18**, 20-13-20, **20-13-22**, 20-13-23, 58-33-13.1	<u>Gender:</u> Employment Housing Public Accommodation Education Insurance Practices	4
	<u>Marital Status:</u> Insurance Practices	
TENNESSEE*		
TENN. CODE ANN. §§ 4-21-401, 4-21-501, 4-21-601, 4-3-1412, 12-4-122, **4-21-405**, **4-21-602** *RFRA: TENN. CODE ANN. § 4-1-407	<u>Gender:</u> Employment Housing Public Accommodation Education	3, 4

TEXAS*		
TEX. PROP. CODE ANN. § 301.021 TEX. LAB. CODE ANN. § 21.051 *RFRA: TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 TO 110.012	Gender: Employment Housing	
UTAH*		
UTAH CODE ANN. §§ 13-7-1, **13-7-2**, 13-7-3, 3, **34A-5-106**, 57-21-5 *RFRA: UTAH CODE ANN. §§ 63L-5-101 TO -403	Gender: Employment Public Accommodation Housing	1, 2, 3, 4, 8, 9

VERMONT		
VT. STAT. ANN. TIT. XXI, §§ 495, 1621 VT. STAT. ANN. TIT IX, §§ 4502, 4503	Sexual Orientation: Employment Housing Public Accommodation	1, 3, 4
	Gender & Gender Identity: Employment Housing Public Accommodation	3
	Marital Status: Employment Housing Public Accommodation	1, 3, 4
VIRGINIA*		
VA. CODE ANN. §§ 2.2-4201, 2.2-4311, 2.2-3903, 36-96.3 *RFRA: VA. CODE ANN. §§ 57-1 TO 57-2.1	Gender: Government Contracts Employment Housing	

WASHINGTON		
WASH. REV. CODE ANN. §§ 49.60.222, 49.60.180, 49.60.215, 49.60.040	Sexual Orientation: Housing Employment Public Accommodation	5, 8
	Gender: Housing Employment Public Accommodation	5, 8
	Marital Status: Housing Employment	5, 8
WEST VIRGINIA		
W. VA. CODE §§ 5-11-9, 5-11A-8	Gender: Public Accommodation Employment Housing	3

WISCONSIN		
WIS. STAT. §§ 111.321, 111.36, 106.50, 106.52	Sexual Orientation: Housing Public Accommodation Employment	
	Gender: Housing Public Accommodation Employment	
	Marital Status: Housing Public Accommodation Employment	
WYOMING		
WYO. STAT. ANN. § 27-9-105, **27-9-102**, 6-9-101	Gender: Public Accommodation Employment	8

Key:

1. Religious or denominational institution or organization exempt from imposing discriminatory employment practices based upon sexual orientation or gender identity.

2. Religious or denominational institution or organization exempt from imposing discriminatory housing practices based upon sexual orientation or gender identity.

3. Religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization exempt from imposing discriminatory housing practices where doing so would promote the religious or denominational principles for which it is established or maintained.

4. Religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization exempt from imposing discriminatory employment practices, where doing so would promote the religious or denominational principles for which it is established or maintained.

5. Laws do not apply to education facility owned, controlled or operated by a bona fide religious corporation, association or society.

6. Religious educational institution may deny access to any area, accommodation, or facility based upon gender.

7. Religious corporation, association, or society may require that applicants and employees conform to its religious tenets.

8. "Employer" does not include certain religious or denominational institutions, entities, corporations, educational institutions, associations, and societies.

9. "Public accommodations" do not include a religious or nonprofit fraternal or social association or corporation, or any place that is principally used for religious purposes.

10. Religious or denominational organization exempt from imposing discriminatory education practices based upon sexual orientation or gender identity.

11. Religious corporation, association, educational institution or society exempt from imposing discriminatory employment practices based upon gender.

12. Religious educational institution exempt from imposing discriminatory education practices based upon sexual orientation, gender, or gender identity.

13. Religious organization exempt from providing insurance coverage for infertility treatment in a manner inconsistent with religious and ethical principles.

14. Religious corporation, entity, association, educational institution or society exempt from imposing discriminatory employment practices or practices concerning matters of discipline, faith, internal organization or ecclesiastical rule, custom or law, based upon gender identity.

15. State, or state-licensed or state-approved, child-placing agency is exempt from imposing discriminatory practices when considering where to place a child for adoption or foster care based upon sexual orientation of the parents.

16. Religious institution exempt from imposing discriminatory public accommodation practices based upon sexual orientation or gender identity.